No. 89-867

Supreme Court, U.S.
FILED
JAN 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

F. & H.R. FARMAN-FARMAIAN CONSULTING ENGINEERS FIRM and FAROUGH FARMAN-FARMAIAN,

Petitioners,

v.

HARZA ENGINEERING COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the courts below correctly held that the Act-of-State Doctrine precluded them from entertaining a suit brought by the former owners of an Iranian engineering firm to recover a debt allegedly owed to that firm for engineering services rendered in Iran, because the Government of Iran, acting validly pursuant to its laws, has expropriated the plaintiffs' interest in the Iranian firm?

2. Whether the courts below acted properly in deciding the above question without first seeking the views of the Executive Branch, when: (a) petitioners made no timely request to either court to obtain the views of the Executive Branch; (b) the Executive Branch, although made aware of this case by petitioners, expressed no desire to participate in it; and (c) the law recognizing such expropriations is well-established?

Rule 29.1 List

For Respondent Harza Engineering Company:

Parent: None.

Subsidiaries (other than wholly owned subsidiaries):

None.

Affiliates:

Harza Engineering Company International L.P., a Delaware Limited Partnership.

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v.

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Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for a writ of certiorari.[1]

[1] There is no valid reason for the Court to hold this petition until the Court rules in *W.S. Kirkpatrick v. Environmental Tectonics*, No. 87-2066. *Kirkpatrick* involves entirely different issues and facts. The need for solicitation of an expression of the Executive Branch's views before deciding Act-of-State

(Continued on following page)

STATEMENT OF THE CASE

Petitioners' "Statement of the Case" distorts the record. The undisputed facts, as found by the District Court and reaffirmed by the Court of Appeals, may be summarized as follows:

This action was brought by Farough Farman-Farmaian ("Farough"), a citizen of Iran and a former owner and managing director of an Iranian firm known as F. & H.R. Farman-Farmaian Consulting Engineers Firm ("Firm"). The Firm is an entity equivalent to a corporation; it was created under Iranian law and has its principal place of business in Iran. (Petitioners' Complaint (R.1), p.1, ¶1). In 1964, the Firm and Respondent, Harza Engineering Company ("Harza"), entered into an agreement entitled "COLLABORATION AGREEMENT FOR REPRESENTATION AND CONSULTING ENGINEERING SERVICES IN IRAN" (The "Collaboration Agreement")[2]. Farough brought this action, purportedly on behalf of the Firm and its various owners, to recover fees he claims are owed to the Firm by Harza under the Collaboration Agreement.

(Continued from previous page)

cases, the issue supposedly involved here, is not involved in *Kirkpatrick*, because the views of the Executive Branch were expressed in *Kirkpatrick*.

[2] Petitioners refer to this agreement only as the " 'Collaboration Agreement' " and omit the fact that the very title of the agreement specifies that the services to be rendered by the Firm were to be "in Iran."

The Relationship Between the Firm and Harza.

Shortly after entering into the Collaboration Agreement, Harza entered into a primary agreement with the Iranian Ministry of Power and Water (the "Ministry") to render engineering services to the Ministry on certain large dams and hydroelectric projects located in Iran. (Petitioners' Appendix ("Pet. App.") 16a). The primary agreement with the Ministry required that Harza associate with a local Iranian firm, which Harza did through the Collaboration Agreement.

The Collaboration Agreement between Harza and the Firm provided that they would "collaborate on the engineering and execution of Consulting Engineering Services *in Iran*. . . ."[3] (emphasis added). (R.1, Ex.A.1, p.1). Payments by Harza under the Collaboration Agreement were to be made to the Firm in Iran after payment was received by Harza on its contract with the Ministry. (R.1, Ex.A.1, p.3). Harza had a bank account in Iran through which it received payment from the Ministry and, in turn, paid the Firm. Harza also had an Iranian accountant in Teheran to handle its financial affairs.

The District Court correctly found that "the United States has no connection to the relationship [between the

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[3] The "consulting engineering services" which Petitioners claim the Firm performed "in Chicago" consisted of infrequent visits by Farough to Chicago which coincided with visits to his children who lived in the United States (R.1, p.6, ¶16; Pet. App. 3a, 25a-26a). Farough was the only principal or employee of the Firm (out of 60 professionals and 100 employees) to come to the U.S., allegedly on Firm business (R.1, p.6, ¶16).

Firm and Harza] except that [Harza] has an office here." (Pet. App. 27a). The Seventh Circuit affirmed, noting that the Firm's "contemplated and actual operations . . . were confined to Iran" and that the Firm had no assets outside Iran.[4] (Pet. App. 11).

The District court described the relationship between Harza and the Firm as follows:

> "The sub-contract between Harza and the F-F firm contemplated that all services would be performed in Iran, all invoices from the F-F firm would be sent to Harza's office in Teheran with copies to the Chicago office, and all payments to

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[4] Petitioners refer to "funds . . . deposited in a specific account in a Chicago bank," "a specific *per diem* for services performed outside Iran by the Firm's principals," "[s]ome payments [being] made in dollars, others in Iranian rials," "billing, accounting and other financial records [being] maintained by Harza in Chicago," and the Firm's sending invoices to Chicago (Petition 2-3). These claims are distortions of the record and are irrelevant as was recognized by the courts below. The funds deposited in Chicago (for tax reasons) were *de minimis*, and in any event are not the funds that Petitioners are claiming. (Pet. App. 25a). The *per diem* was for services performed outside Teheran, not outside Iran. (R.1, Ex.A.1, p.5, ¶3). By far the largest payments were to be made in Iranian rials, not dollars, including the payments at issue here (Pet. App. 25a-26a). The Firm's invoices were sent to Iran as well as Chicago and the invoices were paid in Iran, not Chicago (Pet. App. 25a). Petitioners' references to engineering, accounting and other work done by Harza in Chicago is just one aspect of Petitioners' persistent (but so far unsuccessful) attempt to confuse two different things: the work done by Harza under its contracts with the Ministry, which is not the subject of the Petitioners' claim, and the work done by the Firm under its subcontract with Harza, the Collaboration Agreement, which is the subject of Petitioners' claim. This work was done exclusively in Iran.

> the F-F firm would be in rials and made through Iranian banks. During the course of the relationship only minor modifications of these arrangements occurred. Farough pressed to have a small portion of the payments made in dollars and attributed this to 'work outside Iran' presumably so he could avoid Iranian tax on the payments. Farough also made infrequent trips to Harza's offices in Chicago for brief discussion on the progress being made on the various projects. These appearances at Harza's Chicago office were not at Harza's request. Apparently they were timed to allow at the same time visits by Farough with his children who were residing here in the United States. But all financial records relating to payments in rials to the F-F firm were maintained in Harza's office in Iran. The largest proportion of compensation paid to the F-F firm was in rials and the payments were made to him through the Iranian banks in which Harza maintained banking accounts.
>
> While the relationship between the parties necessarily has some contacts with the United States since Harza itself is based here in Chicago, all of the functional elements of the relationship were centered in Iran. As in *Tchacosh [Co. v. Rockwell International Corp.*, 766 F.2d 1333 (9th Cir. 1985)], Iran was in a position to 'perform a *fait accompli*' over the payment or receipt of any money owed the F-F firm by Harza."

(Pet. App. 25a-26a).

As the Seventh Circuit put it, "[w]hat is at issue in this case is not the rights or interests of an American company . . . but the propriety of dealings between the Iranian government and an Iranian corporation" (Pet. App. 10a).

Expropriation of the Firm.

In 1979, the former managers of the Firm, including Farough, were divested of management of the Firm and replaced by officials appointed by Iran under the "Temporary Director Act." (R.20, ¶¶17,18; Petitioners' Appellate Brief 5-6; Pet. App. 17a-18a). In 1980, the stock in the Firm was expropriated by the state of Iran under the Iranian "Management and Acquisition Act." (See Affidavit of Iranian law expert, Mahmoud Katirai, (R.20), ¶26; Pet. App. 17a-18a). At pages 12 and 13 of their Petition, the Petitioners state that "[P]etitioners do not challenge the validity of the taking under Iranian law, but only its reach outside Iran." (Petition 12-13).[5]

Nature of Petitioners' Claim

At the time of the Iranian Revolution, Harza was owed substantial fees for services rendered to the Iranian Government. Pursuant to the Algerian Accords (regarding the freeing of American hostages) and the Claims Settlement Agreement between the United States and Iran, Harza brought a claim against Iran before the Iran-U.S. Claims Tribunal at The Hague. After extensive litigation, Harza received some, but not all, of the amount

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[5] The principal thrust of Petitioners' argument in the District Court was to contest the validity and effectiveness of Iran's actions *under Iranian law* (Pet. App. 3a). Despite having filed affidavits of a purported expert in Iranian law to the opposite effect (Pet. App. 18a-19a), Petitioners later conceded that these expropriations (or "confiscations" as Petitioners call them) were legal and effective under Iranian law. (Pet. App. 3a; Petitioners' Appellate Brief 5-6).

claimed.[6] Farough then demanded payment from Harza, claiming that part of Harza's recovery was for services rendered by the Firm. Farough purported to be acting on behalf of the Firm; however, at that time, Farough was not an owner, manager or representative of the Firm and Harza declined to pay him. Farough then filed this suit.[7]

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[6] Harza's receipt of this award can hardly be considered a "windfall," as Petitioners imply. Harza received only a partial recovery, which was further reduced by the portion of Harza's claim attributable to non-U.S. shareholders. (R.1, Ex.D.1, ¶¶25-32). To obtain the award, Harza had to incur substantial fees, travel and other expenses, and disruption to its business. Harza was also forced to defend against an enormous counterclaim in the Tribunal which would have bankrupted Harza had the counterclaim been successful. (R.1, Ex.D.1, pp.47-85). Further, Harza paid a "skim-tax" levied by the U.S. government on all Tribunal awards, which amounted to $168,256.45. *See, United States v. Sperry Corporation*, ___ U.S. ___, 110 S.Ct. 307, 50 U.S.L.W. 4018 (1989) (skim-tax held constitutional). Moreover, as the Court of Appeals noted, whatever "windfall" Harza might temporarily enjoy would be nullified if other claimants, perhaps the Iranian liquidators, insisted Harza pay them. (Pet. App. 11a).

[7] Initially, Farough filed this suit on behalf of both the Firm and the shareholders. One of the other shareholders is now a U.S. citizen residing in the Northern District of Illinois (Pet. App. 4a). Her U.S. citizenship, which would have destroyed complete diversity, was not disclosed until oral argument before the Court of Appeals. After disclosure of this fact, Farough retreated from his claim that he was filing suit on behalf of the other shareholders, leading the Court of Appeals to conclude that there was federal jurisdiction under the diversity statute. (Pet. App. 4a-8a).

Petitioners' Failure to Timely Request Solicitation of the Views of the Executive Branch.

Although Farough filed four briefs in the District Court resisting defendant's motion for summary judgment, and also was granted oral argument on the motion, at no time did he request that the District Court solicit the views of the Executive Branch. Since this issue was not raised by Petitioners, it was not passed on by the District Court.

It was not until after briefing had been completed in the Court of Appeals that Petitioners suggested for the first time that the court solicit the views of the Executive Branch on the Act-of-State issue. This suggestion took the form of a letter from counsel for Petitioners, which is reprinted in the Appendix to this brief (Res. App. 1a). The letter purported to be filed under Federal Rule of Appellate Procedure 28(j) and Seventh Circuit Rule 28(i), but it did not conform to those rules in either form or substance.[8] Because counsel's letter did not conform to the rules, Respondent did not respond to it. The Court of Appeals did not act on it.

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[8] Both F.R.A.P. 28(j) and Seventh Circuit Rule 28(i) forbid argument. Circuit Rule 28(i) states that:

> "The letter shall state in a single brief sentence the proposition the authorities support but shall contain no other argument or explanation."

Further, F.R.A.P. 28(j) is not designed to accommodate afterthoughts. It is confined to the situation where

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The issue was not mentioned again until the PETITION FOR REHEARING filed by Petitioners in the Court of Appeals on August 30, 1989, which was later denied.[9]

Thus, Question 2 of Petitioners' "QUESTIONS PRESENTED" (the purported need for an expression of the Executive Branch's views) was neither timely nor properly raised by Petitioners before either the District Court or the Court of Appeals.

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> "pertinent and significant authorities come to the attention of a party after the party's brief has been filed. . . ."

However, the cases cited by Petitioners in their letter were decided before the filing of their brief. Obviously, Petitioners were aware of these cases before they filed their briefs in the Court of Appeals since these cases are cited in those briefs. (Petitioners' Appellate Brief, 20, 37; Petitioners' Appellate Reply Brief, 4, 5).

[9] Significantly, the letter of Petitioners' counsel to the Court of Appeals indicates that Petitioners had "provided a copy of the [District Court decision in this case] to the Department of State, and [Petitioners] have now also provided to the Department [of State] copies of the briefs filed in [the Court of Appeals]." The PETITION FOR REHEARING states that Petitioners also provided a copy of the opinion of the Court of Appeals to the Department of State sometime before August 30, 1989. Despite being informed of the District Court's decision, and later that of the Court of Appeals, the Executive Branch expressed no view and gave no indication of any desire to do so. Nor has the Executive Branch filed an amicus brief in this case suggesting that this Court grant the petition for a writ of certiorari, as it did in *Kirkpatrick*.

REASONS FOR DENYING THE WRIT

I. THE SEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS

The Seventh Circuit's decision in this case does not conflict with the decision of any other circuit. To the contrary, the Seventh Circuit's decision followed an indistinguishable and unanimous decision of the Ninth Circuit Court of Appeals affirming the U.S. District Court for the Central District of California in a virtually identical case. (Pet. App. 9a, citing *Tchacosh Co. v. Rockwell International, Corp.*, 766 F.2d 1333 (9th Cir. 1985)).[10] No circuit court to Respondent's knowledge, and no case cited by Petitioners, has expressed the view that there is a conflict of circuits. To the contrary, the Seventh Circuit in this case and the Ninth Circuit in *Tchacosh* easily reconciled the cases on which Petitioners rely. See Pet. App. 8a-9a; *Tchacosh*, at 1338.

Petitioners attempt to create the appearance of a conflict with other circuits by distorting the holdings and

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[10] The *Tchacosh* case was itself followed by a different panel of the Ninth Circuit, including Judge, now Justice, Kennedy. *LPL Technical Services, Iran S.A., v. Parsons-Jurden International Corporation, et al.*, No. 85-2853, (9th Cir.) (December 8, 1986). The *LPL* opinion states that it is "not for publication" and "may not be cited to or by the courts of this [the Ninth] Circuit, except as provided by 9th Cir. R. 21." Thus, the identical issue presented here has been considered by three district judges and nine judges of the U.S. Court of Appeals, and all have come to the same conclusion.

analyses of other courts of appeals and by confusing different types of assets. The asset involved in this case is an alleged claim or debt payable in Iran for services rendered under a contract by an Iranian firm in Iran.[11] The only other cases to Respondent's knowledge involving similar claims for services rendered in a foreign country are the Ninth Circuit cases, *Tchacosh* and *LPL*, which come to the same result the Seventh Circuit did.

This case cannot be equated, as Petitioners do, to cases involving a bank account, a fund, or funds being held in the United States at the time of the confiscation or expropriation. *See Republic of Iraq*, 353 F.2d at 51; *Bandes*, 852 F.2d at 667. This case did not involve an account, or a fund or funds being held in the United States by Harza at the time of the expropriation.[12]

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[11] Petitioners assume there is a debt involved in this case, as opposed to a contract claim. If it is a contract claim, its situs would be Iran, the place of performance, *Tchacosh*, 766 F.2d at 1337-39, and the extraterritorial exception to the Act-of-State Doctrine would clearly not apply. Many of the cases relied upon by Petitioners involve undisputed debts or funds located in the U.S., rather than disputed contract claims like this one. *See, Bandes v. Harlow & Jones, Inc.*, 852 F.2d 661 (2d Cir. 1988); *Republic of Iraq v. First Nat'l. City Bank*, 353 F.2d 47 (2d Cir. 1965), *cert. denied*, 382 U.S. 1027 (1966). Comments, especially *dicta*, and analysis in these cases as to the situs of undisputed "debts," would not apply to the disputed contract claim involved here.

[12] The application of the Act-of-State Doctrine is determined by the facts at the time of the expropriation. The "extraterritorial exception" to the Act-of-State Doctrine does not come into play merely because assets ultimately wind up in the United States after confiscation. *See, Banco Nacional de Cuba v.*

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This case is also different from cases involving goods located in the United States or payment for those goods, *Bandes, supra; United Bank, Ltd. v. Cosmic International, Inc.*, 542 F.2d 868 (2d Cir. 1976); *Menendez v. Saks & Co.*, 485 F.2d 1355 (2d Cir. 1973), *cert. denied in part*, 425 U.S. 991 (1976), *rev'd on other grounds sub. nom. Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976); *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706 (5th Cir. 1968) *cert. denied*, 393 U.S. 924 (1968), and cases relating to the U.S. trademarks and copyrights. *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1026-30 (5th Cir.), *cert. denied*, 409 U.S. 1060 (1972); *Zwack v. Kraus Bros. & Co.*, 237 F.2d 255 (2d Cir. 1956); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 293 F. Supp. 892 (S.D.N.Y. 1968), *modified on other grounds*, 433 F.2d 686 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971); *F. Palicio y Compania, S.A. v. Brush*, 256 F. Supp. 481 (S.D.N.Y. 1966), *aff'd* 375 F.2d 1011 (2d Cir. 1967, *cert, denied*, 389 U.S. 830 (1967). None of these cases involved the kind of claim asserted here – namely, a claim for payment for services rendered by a foreign corporation in its home country. These decisions do not conflict in any way with either the results reached or the analysis by the Seventh Circuit in this case.

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Sabbatino, 376 U.S. 398 (1964); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918). While Petitioners do not address the issue of timing, they appear to acknowledge that the proper focus is the "time of confiscation." (Petition 9-12). Thus, many facts recited by Petitioners, such as the award to Harza by the Hague Tribunal and payment of that award by Iran, are irrelevant to the Act-of-State analysis, since they occurred after the expropriation.

Petitioners argue that " '[f]oreigners entrusting their property to custodians in this country are entitled to expect this historic policy [against confiscations] to be followed save when the weightiest reasons call for a departure.' " (Petition 15). This quote originates in the *Republic of Iraq* case, 353 F.2d at 51-52, which involved a monetary deposit and stock certificates in a U.S. bank. The instant case does not involve a foreigner entrusting its property to a U.S. custodian. To the contrary, the payments involved in this case were to be made through a bank in Iran and were not entrusted by Petitioners to any U.S. custodian. (Pet. App. 25a). As Judge Posner correctly summarized, the cases relied on by Petitioners involved a legitimate concern on the part of the United States "with protecting property and transactions (perhaps even contemplated transactions, as in the two Second Circuit cases) within [U.S.] borders; that is the interest which underlies the extraterritorial exception to the act of state doctrine. That interest is not present here." (Pet. App. 11a).

Petitioners argue that the Seventh Circuit in this case (and the Ninth Circuit in the *Tchacosh* case) "significatly expand[ed] the scope of the Act-of-State doctrine" by adopting a new and different test. (Petition 7). In fact, what the Ninth and Seventh Circuits did was to resist attempts to eliminate the Act-of-State Doctrine. The claims and transactions involved here and in *Tchacosh* had no connection to the United States other than the location of the defendant debtor. Since virtually all Act-of-State cases in U.S. courts involve U.S. entities as debtor or defendant, adopting plaintiffs' arguments would eliminate the Act-of-State Doctrine in all such cases. Should

Petitioners prevail, the Act-of-State Doctrine would effectively become a nullity in United States courts. As Petitioners themselves have previously conceded:

> "[In *Tchacosh*, the] *only* connection with the United States was that [the defendant debtor] was a U.S. firm. The court rightly said if this were enough to displace the act of state doctrine, the doctrine would lose all meaning."

Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss or for Summary Judgment (R.30, p. 26).

Of course, there are many decisions in U.S. courts applying the Act-of-State Doctrine which involve U.S. debtors or defendants. *See, e.g., Sabbatino*, 376 U.S. at 428, 431 (1964); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68, 77 (2d Cir. 1977), *cert. denied*, 434 U.S. 984 (1977). If the fact that the debtor or defendant is a U.S. entity is sufficient to rule out application of the Act-of-State Doctrine, it would mean that these cases were wrongly decided. Even Petitioners do not argue this.

Petitioners' claim that the Seventh and Ninth Circuits adopted a new and different "creditor-oriented test," in contrast to a supposedly "time honored" "debtor-oriented test" is simply not true. The location or citizenship of the defendant or debtor has never been held by the U.S. Supreme Court to be dispositive in itself. To the contrary, the cases in which the Act-of-State Doctrine was adopted and developed by the U.S. Supreme Court involved U.S. debtors or defendants, yet the Act-of-State Doctrine was found to apply. *Underhill v. Hernandez*, 168 U.S. 250 (1897); *Sabbatino, supra*.

In none of the cases cited by Petitioners has the court adopted the rule they propose, *i.e.*, "that the situs of a debt for Act-of-State purposes is with the debtor" regardless of the circumstances. To the contrary, the "teaching of the courts which have considered application of the Act-of-State Doctrine [is] . . . that the doctrine is to be applied pragmatically and flexibly, with reference to its underlying considerations." *Tchacosh*, at 1337, citing *Sabbatino*, 376 U.S. at 428; *United Bank, Ltd. v. Cosmic International, Inc.*, 542 F.2d 868, 874 (2d Cir. 1976); *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 715 (5th Cir. 1968), *cert. denied*, 393 U.S. 924 (1968).

Employing this fluid test, some decisions have found the situs of a debt to be the same as the domicile of the debtor, while other decisions have found the situs of the debt to be other than the domicile of the debtor. These cases are not, as Petitioners suggest, in conflict; the results depend on different circumstances. All courts, including the Ninth Circuit in *Tchacosh* and the Seventh Circuit in this case, look at the totality of the circumstances. As Judge Posner noted, automatically concluding that the situs of the debt is with the debtor would greatly reduce the accepted scope of the Act-of-State Doctrine. "A dispute between an Iranian corporation doing business entirely in Iran, and the government of Iran, could pop up in an American court merely because the corporation was owed some money by an American firm." (Pet. App. 10a-11a).

This case, as well as *Tchacosh*, represents an extreme set of facts in which there is virtually no nexus to the United States (and every connection to the expropriating state). As the Court in *Tchacosh* stated:

> "Appellant has advanced no case in which the nexus of the relevant relationship with a foreign country is so strong, and that with the United States so weak, in which a court has refused to give effect to the acts of the foreign state."

766 F.2d at 1338.

II. THE QUESTION OF SOLICITATION OF THE VIEWS OF THE EXECUTIVE BRANCH WAS NOT TIMELY OR PROPERLY RAISED BELOW.

Petitioners are incorrect in stating that this Court now has under consideration the question of whether the District Court should have sought the views of the State Department. Petitioners' reliance on the *Kirkpatrick* case for this proposition is misplaced. Solicitation of the Executive Branch's opinion is not at issue in *Kirkpatrick*. In *Kirkpatrick*, the views of the State Department *were* expressed, and there is no issue as to whether those views should have been sought.

The actual "question presented" on which certiorari was granted in *Kirkpatrick* deals with whether the Act-of-State Doctrine should be applied to bar a civil action brought to recover damages sustained as a result of losing a military construction contract with a foreign government allegedly because of bribery of an official of the foreign government. The *Kirkpatrick* case is completely dissimilar factually to the case at bar and to other expropriation cases.

Additionally, the question of solicitation of the views of the Executive Branch was never timely or properly raised below. Accordingly, this Court should not "review" that question. Petitioners raised this issue by

way of a letter submitted to the Court of Appeals only after all of the briefing in that court had occurred. This "supplemental authority" letter (Res. App. 1a), was not timely and violated Federal Rule of Appellate Procedure 28(j) and Seventh Circuit Rule 28(i). See footnote 8, *supra*.

Moreover, the Petitioners had ample opportunity to raise the issue in any one of the numerous pleadings they filed in the District Court. Having failed to do so, they were barred from raising it on appeal. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868 (1976) citing, *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719 (1941).

CONCLUSION

The Seventh Circuit properly interpreted and applied the Act-of-State Doctrine in this case. This was a straightforward expropriation case of the type that has been routinely decided without seeking the views of the State Department; there was no need to solicit the views of the State Department. Moreover, the issue was not raised in a proper or timely fashion in the lower courts. The Petition

for a Writ of Certiorari should be denied as to both questions.

Respectfully submitted,

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APPENDIX

APPENDIX

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April 7, 1989

BY FEDERAL EXPRESS

Mr. Thomas F. Strubbe, Clerk
U.S. Court of Appeals for the
Seventh Circuit
219 South Dearborn Street
Room 2722
Chicago, Illinois 60604

Re: *Farman-Farmaian, et al. v. Harza Engineering Co.*
Civil No. 88-3133

Dear Mr. Strubbe:

I write pursuant to F.R.A.P. 28 (j) and Circuit Rule 28 (i) to call to the attention of the Court the possible existence of what may be pertinent and significant authority.

Because the District Court's application of the Act of State doctrine relies on the court's appraisal of the foreign policy implications of this case, we provided a copy of

the decision to the Department of State, and we have now also provided to the Department copies of the briefs filed in this Court. We suggest that the Court ask the Department for its views on the need for the application of the doctrine in the context of this case, in light of the sharp disagreement of the parties on that question. Such a procedure has been followed in other cases in which such foreign policy concerns were involved, *see, e.g., Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1361 (9th Cir. 1988); *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052, 1056-57, 1061-62 (3rd Cir. 1988).

Respectfully submitted,

/s/ John Vanderstar
John Vanderstar
Attorney for appellant

cc: Mr. Prior
Mr. Zak